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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

1940

No. 83

36

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

WALTER C. JANNEY AND PAULINE F. M. JANNEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 26, 1940
CERTIORARI GRANTED APRIL 26, 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 843

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

VS.

WALTER C. JANNEY AND PAULINE F. M. JANNEY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT**

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2 GUY T. HELVERING VS. WALTER C. JANNEY ET AL.

3 Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed October 8, 1936

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-2, EYL-90D) dated July 29, 1936, and as a basis for their proceeding allege as follows:

1. The petitioners are husband and wife; they are citizens of the United States, and reside at Bryn Mawr, Pennsylvania.

2. On information and belief the notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on July 28, 1936.

3. The taxes in controversy are income taxes for the calendar year 1934, and in the amount of thirty-seven thousand one hundred nine dollars and twenty-nine cents (\$37,109.29).

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

The respondent has erroneously disallowed a loss of \$89,963.35, sustained by the petitioner, Walter C. Janney, upon the sale of capital assets during said year 1934, notwithstanding the inclusion in the petitioners' joint return for said year 1934 of gains, from the sale of capital assets by the petitioner, Pauline F. M. Janney, in the amount of \$94,491; in contravention of Sections 51 (b) and 117 (d) of the Revenue Act of 1934.

The respondent has erroneously attributed a capital loss of \$729.82 (appearing in the petitioners' joint return as an item in arriving at a net income of \$21,564.31 from the W. C. Janney trust) to the petitioner Walter C. Janney, whereas in fact said W. C. Janney trust was created by the petitioner Pauline F. M. Janney and said capital loss should be attributed to her, and allowed as a deduction against the capital gains of said petitioner, Pauline F. M. Janney, in any event.

5. The facts upon which the petitioners rely as a basis for this proceeding are as follows:

FIRST ASSIGNMENT OF ERROR

(a) The petitioners are husband and wife and were living together at the close of the taxable year 1934.

(b) The petitioners filed a joint income tax return for the calendar year 1934.

(c) During the year 1934 the petitioner, Pauline F. M. Janney, realized gains from the sale of capital assets, of which the percentage to be taken into account, under Section 117 (a) of the Revenue Act of 1934, was \$94,491.

(d) During the year 1934 the petitioner, Walter C. Janney, sustained losses from the sale of capital assets, of which the percentage to be taken into account under Section 117 (a) of the Revenue Act of 1934 was \$91,963.35.

(e) In their joint income tax return for the year 1934 the petitioners reported the aforesaid gains and losses from the sale of capital assets, deducting said losses in the amount of \$91,963.35 from said gains in the amount of \$94,491, leaving a net gain reported in said income tax return of \$2,527.65.

5 (f) The respondent disallowed said deduction to the extent of \$89,963.35, on the alleged ground that "the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets."

SECOND ASSIGNMENT OF ERROR

(g) On July 7, 1926, by a revocable deed of trust, the petitioner, Pauline F. M. Janney, conveyed to Walter C. Janney, as Trustee, a certain property to be held by said Trustee upon the trusts set forth in said deed.

(h) During the year 1934 net income in the amount of \$21,564.31 was received from said trust property, after deducting a loss from the sale of capital assets in the amount of \$729.82.

(i) In the aforesaid joint income tax return petitioners reported said net income of \$21,564.31 received by the petitioner, Pauline F. M. Janney, as grantor in said revocable deed of trust, and said capital loss of \$729.82.

(j) During the year 1934 the petitioner Pauline F. M. Janney realized gains from the sale of capital assets in the amount of \$94,491, as alleged in paragraph 4 (c) hereof.

(k) The respondent, in his determination of the deficiency herein, disallowed the deduction of said capital loss of \$729.82.

Wherefore the petitioners pray that this Board may hear the proceeding and determine:

(a) That the extent to which the losses sustained by the petitioner, Walter C. Janney, from the sale of capital assets, shall be allowed, shall be the sum of \$2,000 plus the gains realized by his wife, the petitioner Pauline F. M. Janney, from the sale of capital assets.

6 (b) That the capital loss of \$729.82 sustained in connection with the trust created on July 7, 1926, was sustained by

4 GUY T. HELVERING VS. WALTER C. JANNEY ET AL.

the petitioner, Pauline F. M. Janney, and that said loss be allowed in full.

(c) That there is no deficiency in the petitioners' income tax for the year 1934.

BERNHARD KNOLLENBERG,
Counsel for Petitioners,
25 Broadway, New York, N. Y.

[Duly sworn to by Walter C. Janney and Pauline F. M. Janney; jurats omitted in printing.]

7 *Exhibit A to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, July 28, 1936.

Mr. WALTER C. JANNEY and
Mrs. PAULINE F. M. JANNEY
(Husband and Wife)
Bryn Mawr, Pennsylvania.

SIR and MADAM:

You are advised that the determination of your income tax liability for the taxable year 1934 discloses a deficiency of \$37,109.29 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

8 Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Sgd.) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:B-2.
EYL-90D.

In re Mr. Walter C. Janney and Mrs. Pauline F. M. Janney
(Husband and Wife), Bryn Mawr, Pennsylvania

INCOME TAX LIABILITY

Year, 1934; Income Tax Liability, \$38,738.20; Income Tax Assessed, \$1,648.91; Deficiency, \$37,109.29.

The deficiency shown herein is based upon the report dated April 25, 1936, prepared by Revenue Agent J. T. Jamieson, a copy of which was transmitted to you under date of May 21, 1936.

The computation of tax is as follows:	
Net income reported on return, line 20-----	\$26,160.30
Plus:	
1. Increase in fiduciary income-----	\$729.82
2. Decrease in loss-----	80,693.35
	<u>80,693.17</u>
Adjusted net income-----	\$116,853.47
Less: Exemption-----	2,900.00
Income subject to surtax-----	<u>\$113,953.47</u>
Less:	
Dividends-----	\$21,170.50
Earned income credit-----	300.00
	<u>21,470.50</u>
Subject to normal tax-----	\$92,482.97
Normal tax at 4% on \$92,482.97-----	3,699.32
Surtax on \$113,953.47-----	<u>36,255.80</u>
Total tax-----	\$38,955.12
Less: Tax paid at source-----	196.92
Tax assessable-----	<u>\$38,758.20</u>
Tax previously assessed, account #217014-----	1,648.91
Deficiency-----	<u>\$37,109.29</u>

EXPLANATION OF CHANGES

1. It is noted you reported a net amount of \$21,564.31 from the W. C. Janney Trust. Included in this amount, however, was a capital loss of \$729.82. Inasmuch as this trust was revocable, the capital loss has been transferred from line 6 to line 8 and included in your total capital loss.

10 The disallowance of the capital loss of \$729.82 from trust income results in an increase in fiduciary income of \$729.82.

2. Information on file in the Bureau discloses you claimed a loss of \$91,963.35 from sales of stocks and bonds which was offset against a gain of \$94,491.00 on transactions of your wife and a net gain of \$2,527.65 reported on your joint return. Article 117-5 of Regulations 86, states that in the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

Section 117 (d) of the Revenue Act of 1934 states that losses from sales or exchanges of capital assets shall be allowed only to the extent of \$2,000.00 plus the gains from such sales or exchanges.

Therefore, your capital loss is limited to an amount of \$2,000.00. Since a loss of \$91,963.35 was claimed, there is an increase in income of \$89,963.35.

Reference is made to your letter dated June 26, 1936, addressed to the Commissioner of Internal Revenue in which you stated that when you received a ninety-day letter giving you the right to appeal to the United States Board of Tax Appeals, you planned to take an appeal to the Board in the hope that the Board will overrule the Commissioner's adverse ruling in this and similar cases.

In view of the above ninety-day letter is now being forwarded.

11 Before United States Board of Tax Appeals

Answer

Filed November 24, 1936

Comes now the Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1934. Denies all other allegations contained in paragraph 3 of the petition.

4. Denies that the respondent committed error as alleged in paragraph 4 of the petition.

5 (a), (b), (c). Admits the allegations contained in subparagraphs (a), (b), and (c) of paragraph 5 of the petition.

5 (d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition.

5 (e). Admits that in their joint income tax return for the year 1934, the petitioners reported gains realized by petitioner Pauline F. M. Janney from the sale of capital assets in the amount of \$94,491 and deducted from said gains the claimed capital losses alleged to have been sustained by petitioner Walter C. Janney in the amount of \$91,963.35. Denies all other allegations contained in subparagraph (e) of paragraph 5 of the petition.

5 (f). Admits that the respondent disallowed the claimed deduction for losses alleged to have been sustained by petitioner Walter C. Janney from the sale of capital assets to the extent of \$89,963.35. Denies all other allegations contained in subparagraph (f) of paragraph 5 of the petition.

5 (g). Admits that in the calendar year 1934 certain property was held in a revocable trust by Walter C. Janney, trustee, but for lack of information sufficient to form a belief as to the truth or falsity thereof, denies that said property was conveyed to Walter C. Janney, as trustee, by petitioner Pauline F. M. Janney on July 7, 1926, as alleged in subparagraph (g) of paragraph 5 of the petition. Denies all other allegations contained in subparagraph (g) of paragraph 5 of the petition.

5 (h). Admits the allegations contained in subparagraph (h) of paragraph 5 of the petition.

5 (i). Admits that in their joint income tax return petitioners reported net income received from a trust of which Walter C. Janney was trustee in the amount of \$21,564.31 after deducting a capital loss of \$729.82. Denies all other allegations contained in subparagraph (i) of paragraph 5 of the petition.

5 (j). Admits that during the year 1934 the petitioner Pauline F. M. Janney realized gains from the sale of capital assets of which the percentage to be taken into account under Section 117 (a) of the Revenue Act of 1934 was \$94,491. Denies all other allegations contained in subparagraph (j) of paragraph 5 of the petition.

5 (k). Admits that the respondent in his determination of the deficiency herein, disallowed to petitioner Pauline F. M. Janney, a deduction of said capital loss of \$729.82 but qualifies the admission by alleging that respondent determined that said capital loss of \$729.82 was a loss of petitioner Walter C. Janney who was allowed a deduction for capital losses to the extent of the statutory limit of \$2,000 under the provisions of Section 117 (d) of the Revenue Act of 1934, all of which is shown in the notice of deficiency.

13 6. Denies generally and specifically each and every allegation contained in taxpayers' petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Sgd.) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

Of Counsel:

CHESTER A. GWINN,
JAMES D. HEAD, Jr.,
*Special Attorneys,
Bureau of Internal Revenue.*

14 Before United States Board of Tax Appeals

Stipulation of facts

Filed November 16, 1937

It is hereby stipulated and agreed, by and between the parties hereto, through their respective attorneys of record, that, for the purposes of this proceeding only, the following facts may be taken as true without prejudice to the right of either party to introduce other evidence at the hearing of this cause:

1. Petitioners Walter C. Janney and Pauline F. M. Janney are husband and wife and reside at Bryn Mawr, Pennsylvania.

2. The petitioners on March 15, 1935, filed with the Collector of Internal Revenue for the First District of Pennsylvania, whose office is located in Philadelphia, Pennsylvania, a single joint Federal income tax return for the calendar year 1934. There is attached hereto and made a part hereof and marked Exhibit I a photostat copy of the petitioners' joint Federal income tax return for the calendar year 1934.

3. Within the statutory period of limitation, on July 28, 1936, the respondent, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1934, mailed to the petitioners by registered mail a notice of deficiency. A true copy of said notice of deficiency is attached to the petition filed October 8, 1936, as "Exhibit A" and the same is hereby by reference made a part of this stipulation of facts.

4. During the calendar year 1934, the petitioner Pauline F. M. Janney sold various capital assets as defined in Section 117 (b) of the Revenue Act of 1934. The following table shows the gains and losses realized by her on the sales of such capital assets and

the amount of such gains and losses to be taken into account under Section 117 (a) of the Revenue Act of 1934:

15 Capital assets sold	Gains	Losses	Net gain or loss	Percentage to be taken into account under Section 117 (a) of the Revenue Act of 1934	
				Percentage	Amount
(1) Held less than one year.....	\$0, 300. 00	(\$222. 50)	\$5, 027. 50	100%	\$5, 027. 50
(2) Held from one to two years.....	98, 133. 55	(325. 00)	97, 808. 55	80%	78, 078. 84
(3) Held from two to five years.....	7, 798. 30	-----	7, 798. 30	60%	4, 681. 38
(4) Held from five to ten years.....	15, 308. 06	-----	15, 308. 06	40%	6, 123. 23
Totals.....	\$127, 501. 03	(\$1, 197. 50)	\$126, 303. 53	-----	\$94, 491. 00

5. During the calendar year 1934, the petitioner Walter C. Janney sold various capital assets as defined in Section 117 (b) of the Revenue Act of 1934. The following table shows the gains and losses realized by him on the sales of such capital assets and the amount of such gains and losses to be taken into account under Section 117 (a) of the Revenue Act of 1934:

16 Capital assets sold	Gains	Losses	Net gain or loss	Percentage to be taken into account under Section 117 (a) of the Revenue Act of 1934	
				Percentage	Amount
(1) Held less than one year.....	None	None	-----	100%	None
(2) Held from one to two years.....	\$1, 679. 79	(\$566. 49)	\$1, 113. 30	80%	\$890. 64
(3) Held from two to five years.....	-----	(20, 669. 28)	(20, 669. 28)	60%	(12, 401. 57)
(4) Held from five to ten years.....	-----	(201, 131. 08)	(201, 131. 08)	40%	(80, 452. 43)
Totals.....	\$1, 679. 79	(\$222, 366. 85)	(\$220, 687. 06)	-----	(\$91, 952. 36)

¹ In addition to the above, petitioner sustained a loss of \$7,177.81 on sales of securities to a corporation in which he owned more than 50 percent. of the stock. Such loss, however, is not deductible under the provisions of Section 24 (a) (6) of the Revenue Act of 1934.

17 6. On line 8 of their joint Federal income tax return for the calendar year 1934 under the heading of "capital gain" the petitioners reported the sum of \$2,527.65. The method by which said sum of \$2,527.65 was computed is shown in Schedule C attached to the petitioners' joint Federal income tax return for the calendar year 1934. In said Schedule C the adjusted loss of petitioner Walter C. Janney from the sale or exchange of capital assets as set forth in paragraph 5 of this stipulation in the amount of \$91,963.35 was deducted from the adjusted gain of Pauline F. M. Janney from the sale of capital assets as set forth in paragraph 4 of this stipulation in the amount of \$94,491 and the difference of \$2,527.65 constitutes the amount reported as

capital gain on line 8 of petitioners' joint Federal income tax return for the calendar year 1934.

7. In determining the deficiency from which this appeal is taken, the respondent, in accordance with the provisions of Article 117-5 of Regulations 86, determined that the losses of petitioner Walter C. Janney from sales or exchanges of capital assets could not be applied to reduce the gains realized by petitioner Pauline F. M. Janney from the sale of capital assets. Accordingly, respondent refused to permit the losses of petitioner Walter C. Janney from the sale or exchange of capital assets in the amount of \$91,963.35 to be offset against the gains from the sale of capital assets in the amount of \$94,491 realized by petitioner Pauline F. M. Janney for the purpose of computing their net taxable income for the calendar year 1934, except to the extent of the \$2,000 limitation provided for by Section 117 (d) of the Revenue Act of 1934. By reason of such holding the respondent increased the capital gain reported by petitioners on line 8 of their joint Federal income tax return for the calendar year 1934 by an amount of \$89,963.35. The amount of \$89,963.35 is the amount by which the losses suffered by petitioner Walter C.

Janney from the sale or exchange of capital assets in the amount of \$91,963.35 exceeds the amount of the \$2,000 limitation provided for in Section 117 (d) of the Revenue Act of 1934.

8. On line 6 of their joint Federal income tax return for the calendar year 1934, the petitioners reported as "income from fiduciaries" the sum of \$24,803.34. Included in said sum of \$24,803.34 was a net amount of \$21,564.31 constituting income for the year 1934 of a revocable trust, of which Walter C. Janney was trustee. Petitioner Pauline F. M. Janney was the grantor of said trust, and the income thereof is includable in computing her net income for the calendar year 1934 under the provisions of Section 166 of the Revenue Act of 1934.

9. The net amount of \$21,564.31 reported by petitioners as income of the revocable trust referred to in paragraph 8 of this stipulation consisted of the following:

Interest	\$2,483.20
Interest 2% tax-free covenant	8,250.00
Royalties	285.93
Dividends	11,395.00
	<hr/>
	\$22,414.13
Capital losses	729.82
	<hr/>
	\$21,684.31
Taxes paid	120.00
	<hr/>
	\$21,564.31

10. In determining the deficiency from which this appeal is taken respondent increased the income from fiduciaries reported by petitioners in their joint return by the sum of \$729.82, representing the capital loss of the revocable trust as set forth in paragraph 9 of this stipulation, and determined that the said sum of \$729.82 was a capital loss attributable to petitioner Walter C. Janney. It is agreed that the action of the respondent in increasing the income from fiduciaries reported by petitioners in their joint return for the calendar year by the sum of \$729.82 was correct; but that said sum of \$729.82 is a capital loss attributable to petitioner Pauline F. M. Janney, and not to petitioner Walter C. Janney as determined by respondent.

BERNHARD KNOLLENBERG,
Counsel for Petitioners.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

For Calendar Year 1934

WALTER C. JAMES & DAVID P. M. JAMES

[illegible]

ALTERNATIVE (See Appendix B)

1. 姓名: 王明 2. 性别: 男 3. 年龄: 25 4. 职业: 教师 5. 单位: 某某中学 6. 住址: 某某路某某号 7. 电话: 某某某某 8. 邮编: 某某某某 9. 电子邮箱: 某某@某某.com 10. 身份证号: 某某某某 11. 血型: O 12. 身高: 175cm 13. 体重: 70kg 14. 学历: 本科 15. 学位: 学士 16. 婚姻状况: 未婚 17. 健康状况: 良好 18. 兴趣爱好: 阅读、运动 19. 特长: 写作、演讲 20. 自我评价: 积极向上, 责任心强

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 2493-2494
 2495-2496
 2497-2498
 2499-2500
 2501-2502
 2503-2504
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 2507-2508
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 2511-2512
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25 RE—1934 INCOME TAX RETURN OF WALTER C. JANNEY
AND PAULINE F. M. JANNEY

Item 1—Salaries, Wages, Commissions, Fees, etc.—Director's Fees

The Autocar Co., Ardmore, Pa.....	\$180.00
Boone County Coal Corporation, Sharples, W. Va.....	70.00
2nd & 3d Streets Passenger Railway Co., Philadelphia.....	60.00
Warner Company, Philadelphia.....	75.00
	<u>\$385.00</u>

WALTER C. JANNEY AND PAULINE F. M. JANNEY—JOINT FEDERAL TAX
RETURN FOR YEAR 1934

Item 6—Income from Fiduciaries

Walter C. Janney, Trustee, 1529 Walnut St., Philadelphia.....	\$21,564.31
Comprising:	
Interest.....	\$2,483.20
Interest 2% Tax Free Covenant.....	8,250.00
Royalties.....	235.93
Dividends.....	11,395.00
	<u>\$22,414.13</u>
Capital Net Loss.....	729.82
	<u>\$21,684.31</u>
Taxes Paid.....	120.00
	<u>\$21,564.31</u>
26 Girard Trust Co., Philadelphia, Fiduciary Estate	
Israel Morris Trust—Normal Income.....	3,198.33
Heirs of Anna Morris, deceased, Agency Acct. Net Rentals—	
Samuel W. Morris, Executor, % Girard Trust Co., Phila-	
delphia.....	6.42
Estate Frederick W. Morris, deceased, Normal Income.....	34.28
	<u>\$24,803.34</u>

RE—1934 INCOME TAX RETURN OF WALTER C. JANNEY AND PAULINE
F. M. JANNEY

Item 7—(from Schedule B) Bryn Mawr Real Estate

Rents received.....	\$4,423.58
Less:	
Depreciation.....	\$1,605.00
Taxes.....	1,163.96
Mortgage Interest.....	1,326.00
Insurance.....	245.81
Repairs, Fuel, etc.....	962.13
Commissions.....	222.78
	<u>5,545.68</u>
Net Loss.....	(-) \$1,122.10

Kimberton Farms

Income—			
Rents	-----	\$2,558.10	
Pasture	-----	295.00	
Hay	-----	16.00	
Miscellaneous	-----	.63	2,869.73
<hr/>			
27 Less:			
Depreciation	-----	\$5,235.00	
Expenses—Taxes	-----	1,246.83	
Insurance	-----	329.96	
Repairs and Expenses	-----	1,027.83	7,839.62
<hr/>			
Net Loss	-----		(-) \$4,969.89
<hr/>			
Total Losses	-----		(-) \$6,091.99

Bryan Mawr Cottage

Rent received	-----	1,224.00	
Less: Repairs	-----	75.52	
<hr/>			
Net Gain	-----		1,148.48
<hr/>			
Loss	-----		(-) \$4,948.51

In addition to above there was a new bathroom installed at cost of \$802.02.

WALTER C. JANNEY AND PAULINE F. M. JANNEY

Schedule "E"—Dividends Received

R. J. Reynolds Tobacco Co., Winston-Salem, N. C.	-----	\$7,500.00
Bryn Mawr Trust Co., Bryn Mawr, Pa.	-----	40.00
Northern States Power Co. of Delaware, Chicago, Ill.	-----	100.00
Philadelphia Bourse Co., Philadelphia, Pa.	-----	3.00
General Electric Co., Schenectady, N. Y.	-----	5,500.00
Bryn Mawr Ice Manufacturing & Cold Storage Co., Bryn Mawr, Pa.	-----	142.50
Second & Third St. Passenger Rwy. Co., Philadelphia, Penna.	-----	90.00
Fourth National Investors Corporation, New York City	-----	1,060.00
28 Third National Investors Corporation, New York City	-----	200.00
Insurance Co. of North America, Philadelphia, Pa.	-----	1,000.00
State Street Investment Corporation, Boston, Mass.	-----	4,000.00
Sun Oil Co., Philadelphia, Pa.	-----	795.00
Electric Storage Battery Co., Philadelphia, Pa.	-----	750.00
Total		<hr/> \$21,170.50

The above are included on the Tax Return as follows:

Item #6	-----	\$11,395.00
Item #10	-----	9,775.50
		<hr/> \$21,170.50

RE—1934 INCOME TAX RETURN OF MR. WALTER C. JANNEY

Schedule "F"—Item 14—Taxes Paid—Real Estate, etc.

Radnor Township, Pa.:	
(July)-----	\$980.83
(Sept. W. C.)-----	2,280.97
Town of Falmouth, Mass. (Oct. W. C.)-----	2,128.77
Town of Fairhaven, Mass.-----	30.40
	<u>\$5,429.97</u>

Club Dues

Mill Dam-----	\$8.00	
Rittenhouse-----	15.00	
Racquet-----	15.00	
Radnor Hunt-----	10.00	
Union League-----	12.50	
Pickering Hunt-----	2.50	
Trewern Beagles-----	2.00	
Merion Cricket-----	21.00	
29 Philadelphia-----	18.50	
Acorn-----	6.00	
Springdale Golf (N. J.)-----	3.50	
Woods Hole Golf (Mass.)-----	15.00	
Boca Raton, (Fla.)-----	10.00	
Gulf Stream Golf (Fla.)-----	30.00	
		<u>169.00</u>

Automobile and Miscellaneous

Penna. Dept. of Revenue (tags, etc.)-----	\$100.40	
Mass. State tax (gasoline)-----	43.58	
	<u>\$143.98</u>	

Checks

Penna. Co., etc. Phila.-----	\$19.74	
Falmouth (Mass.) Nat. Bk.-----	1.18	20.92

Telephone

Bell Tel. Co. of Pa.-----	\$9.90	
New England Tel. & Tel. Co.-----	13.48	23.38
S. S. Tickets, U. S. Revenue Tax-----	20.00	
Safe Deposit Box (Girard Tr. Co., Phila.)-----	10.00	218.28
		<u>\$5,817.23</u>

Dividends

W. C. Janney-----	54.32	
Mrs. P. F. M. Janney-----	48.75	103.07
Stamps on Stock Transfers-----		7.00
		<u>\$5,927.30</u>

Schedule "F"—Item 17—Contributions made by Mr. Walter C.
Janney

United Campaign, Philadelphia	\$1,000.00
American Red Cross	275.00
Bryn Mawr Hospital, Bryn Mawr, Pa.	250.00
Church of The Redeemer, Bryn Mawr, Pa.	243.75
Salvation Army	100.00
Monthly Meeting of Friends, Philadelphia	50.00
Cape Cod Hospital, Hyannis, Mass.	25.00
Falmouth Historical Society, Falmouth, Mass.	25.00
Playground & Recreation Asso., Philadelphia	25.00
Chester Co. Council Boy Scouts, West Chester, Pa.	25.00
Girl Scouts, Philadelphia	25.00
Haverford College, Haverford, Pa., Lecture Fund, &c.	20.00
University Museum, Philadelphia	12.00
Public Baths Asso. of Philadelphia	10.00
Mass. Forest & Park Asso., Boston, Mass.	10.00
Penn Normal Ind. & Agr. School, Frogtown, S. C.	10.00
"The Pines," Conshohocken, Pa.	10.00
Academy of Natural Sciences, Philadelphia	10.00
Fairmount Park Art Asso., Philadelphia	5.00
Valley Forge Historical Society, Valley Forge, Pa.	5.00
31 National Missions of the Presbytery, Philadelphia	5.00
Fairmount Park Guard Pension Fund, Philadelphia	5.00
Rush Hospital, Philadelphia	3.50
Florence Crittenden Home, Philadelphia	3.00
Friends Historical Asso., Philadelphia	2.00
Delaware Co. Tuberculosis Asso., Chester, Pa.	2.00
Child Welfare Federation, Philadelphia	1.00
	\$2,157.25

Contributions made by Mrs. Pauline F. M.
Janney

National Recreation Association of New York	100.00
Church Farm School, Glen Loch, Pa.	100.00
Total	\$2,357.25

Mr. and Mrs. Walter C. Janney, 1529 Walnut Street, Philadelphia, Pennsylvania.—Rider to Item 8.

In computing the capital gain of \$2,527.65 set forth in Item 8 of the attached joint return, capital losses of \$91,963.35 sustained by Mr. Janney have been offset against capital gains of Mrs. Janney. The amount of Mr. Janney's losses is separately shown in Schedule C of the return so that if the method of computing capital gain followed by the taxpayers is not allowed by the Bureau the deficiency can be readily determined.

32 The taxpayers have followed the method outlined above in computing the capital gain reported in the attached joint return, instead of the method set forth in the Treasury Regulations, for the reason that they desire to lay the foundation for an appeal to the United States Board of Tax Appeals from the provision in the Regulations that the capital losses of one spouse cannot be offset against capital gains of the other spouse in a joint return. It is submitted that there is nothing in the statute which justifies treatment of capital losses in any different manner from that of interest, taxes, contributions, and ordinary losses, which spouses filing joint returns have for upwards of fifteen years been permitted to deduct in full. That no exception to the general rule was made by the Bureau in the case of gains and losses is established by the following letter from Commissioner Burnet, dated December 29, 1932, quoted on Page 465 of Montgomery's "Federal Tax Hand Book for 1934-5," reading as follows:

"In the case of a husband and wife who file a joint income tax return * * * such joint return is treated as if it were the return of a single individual. In the case of gains and losses from transactions falling within the same class within the meaning of the statute, such as sales of securities not held for a period of more than two years, the loss sustained by the husband would offset the same amount of gain realized by the wife from such source."

Congress' reenactment in the 1934 Act of the language relating to joint returns of the earlier Acts must, in the light of the consistent and long established administrative construction of that language, be recognized as an adoption by Congress of the established administrative construction. *National Lead Company v. United States*, 252 U. S. 140.

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ITEM 8
AMOUNT

SECURITY

ADDRESS

SCHEDULE C

DATE PURCHASED

DATE SOLD

COST

AMOUNT
RECEIVED

TOTAL
PROFIT
OR LOSS

100%
LESS THAN
ONE YEAR

80%
ONE TO TWO
YEARS

60%
TWO TO FIVE
YEARS

40%
FIVE TO TEN
YEARS

21

813	SHARES	AUTOCAR CO 6% PFD	ARDMORE PA	10/29/28 TO 10/28/29	11/19/34	12841 40	2206 09	14575 31 L				14575 31 L
864	SHARES	BOONE COUNTY COAL CORP PFD	SHARPLES W VA	12/28/26	9/18/34	51840 00	31760 64	20079 36 L				20079 36 L
100	SHARES	BOONE COUNTY COAL V T CTF	SHARPLES W VA	12/28/26	1/15/34	6000 00	3000 00	3000 00 L				3000 00 L
1000	SHARES	GENERAL ELECTRIC CO	SCHENECTADY N Y	NOV 1928	10/26/34 TO 12/28/34	140967 52	133482 99	7484 53 L				7484 53 L
63000	SHARES	MISSOURI PACIFIC 5 1/8% 1949	ST LOUIS MO	6/20/33	12/5/34	702 83	136 34	566 49 L		566 49 L		
100	SHARES	NORTHERN STATES POWER A	CHICAGO ILL	12/31/31	12/5/34	22740 22	2060 94	20669 28 L			20669 28 L	
2000	SHARES	PENNA TRUST CO READING PART CTF	READING PA	4/21/27	12/31/34	66119 00	1 00	66118 00 L				66118 00 L
1088 1/5	SHARES	RADIO CORP OF AMER	NEW YORK N Y	2/23/33	12/17/34 TO 12/20/34	6832 50	842 29	1679 79		1679 79		
1164	SHARES	SELECTED INDUSTRIES CORP PFD	JERSEY CITY N J	2/1/29	12/28/34	90792 00	3972 22	86819 78 L				86819 78 L
7418 1/2	SHARES	BOONE COUNTY COAL CORP COM	SHARPLES W VA	12/28/26	12/21/34	115141 25	110787 54	4353 71 L *				
696	SHARES	BOONE COUNTY COAL CORP PFD	SHARPLES W VA	12/28/26	12/21/34	40231 06	38115 48	2115 58 L *				
213	SHARES	BOONE COUNTY COAL CORP PFD V T C	SHARPLES W VA	12/28/26	12/21/34	13473 61	12765 09	708 52 L *				

MRS P F M JANNEY

2500	SHARES	R J REYNOLDS TOBACCO B	WINSTON-SALEM N C	1/20/33	12/26/34 TO 12/28/34	81000 00	123974 16	42974 16				42974 16
75000	SHARES	LIGHT POWER SEC 6% 2026	NEW YORK N Y	4/25/33	12/23/34	35000 00	45855 00	10855 00				10855 00
500	SHARES	ELECTRIC STORAGE BATTERY	PHILADELPHIA PA	12/15/33	12/31/34	22500 00	23500 00	1000 00				1000 00
500	SHARES	INSURANCE CO OF NORTH AMERICA	PHILADELPHIA PA	5/17/33	12/31/34	19745 21	27000 00	7254 79				7254 79
2500	SHARES	STATE STREET INVESTMENT CORP	BOSTON MASS	5/29/33 TO 6/20/33	12/31/34	147500 00	161 00	137500 00				137500 00
394 5/100	SHARES	SUN OIL CO	PHILADELPHIA PA	11/21/33	12/31/34	27087 50	40489 45	13901 95				13901 95
545	SHARES	SUN OIL CO	PHILADELPHIA PA	7/19/34 TO 7/25/34	12/31/34	31315 00	37605 00	6290 00	6290 00			
60000	SHARES	1500 WALNUT ST 1ST 6% CTF OF DEP	PHILADELPHIA PA	10/27/33 TO 12/29/33	12/31/34	2695 00	2160 00	535 00 L				535 00 L
61000	SHARES	DO	DO	1/10/34 TO 1/25/34	12/31/34	3302 50	2640 00	662 50 L	662 50 L			
60000	SHARES	NEW ENGLAND POWER ASSN 5 1/8% 1954	BOSTON MASS	5/10/33	12/31/34	27000 00	30500 00	3500 00				3500 00
60000	SHARES	PHILA CO 5% 1967	PITTSBURGH PA	4/25/33 TO 3/1/33	12/31/34	36102 35	41000 00	4897 65				4897 65
600000	SHARES	COM OF PENNA 4% OCT 1954	HARRISBURG PA	11/10/33	12/31/34	101690 92	117000 00	15309 08				15309 08
60000	SHARES	DELAWARE COUNTY 4 1/4%	DELAWARE COUNTY PA	5/13/32	12/31/34	50731 61	58500 00	7768 39				7768 39

W C JANNEY TRUSTEE FOR MRS F P M JANNEY

500	SHARES	SOUTH BAY CONSOL WATER 1ST 5% 1930	NEW YORK N Y	12/15/33	10/23/34 TO 11/20/34	27617 50	30429 04	2811 54	2811 54			
500	SHARES	THIRD NATIONAL INVESTORS CORP	NEW YORK N Y	2/8/34 TO 2/16/34	7/12/34 TO 9/27/34	9400 00	7847 30	1552 70 L	1552 70 L			
1800	SHARES	FOURTH NATIONAL INVESTORS CORP	NEW YORK N Y	10/27/33 TO 2/1/34	8/21/34 TO 10/9/34	31700 00	29950 84	1749 16 L	1749 16 L			
60000	SHARES	1500 WALNUT ST 1ST 6% CTF OF DEP	PHILADELPHIA PA	10/27/33	10/18/34	1475 00	1235 50	239 50 L	239 50 L			

TOTAL GAIN OR LOSS

PER CENT OF GAIN OR LOSS TAXABLE

4897 68	98711 88	12900 89 L	185822 00 L
100%	80%	60%	40%
4897 68	78969 48	740 53 L	7428 00 L

L - LOSS

SUMMARY

W C JANNEY

MRS P F M JANNEY

NET GAIN

NET LOSS FOR RETURN

NET GAIN FOR RETURN

91963 75

94491 00

2587 68

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35 Before United States Board of Tax Appeals

Docket No. 86849. Promulgated January 31, 1939

WALTER C. JANNEY AND PAULINE F. M. JANNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petitioners, husband and wife, filed a joint income tax return for the taxable year 1934. The wife had gains from the sale of capital assets which were taken into account in accordance with the provisions of section 117 (a), Revenue Act of 1934. The husband had losses from the sale of capital assets which were taken into account in accordance with the same section of the act. *Held*, that the amount of the husband's losses from the sale of capital assets which can be used as a deduction in computing the aggregate net income shown on the joint return is limited to \$2,000 under the provisions of section 117 (d), Revenue Act of 1934, since the husband had no net gain from the sale of capital assets in 1934.

Bernhard Knollenberg, Esq., for the petitioners.

James D. Head, Jr., Esq., for the respondent.

Opinion

Rendered January 31, 1939

BLACK: The Commissioner has determined a deficiency in income tax against petitioners for the year 1934 of \$37,109.29.

The petition assigns two errors, as follows:

36 (1) The respondent has erroneously disallowed a loss of \$89,963.35 sustained by the petitioner, Walter C. Janney, upon the sale of capital assets during said year 1934, notwithstanding the inclusion in the petitioners' joint return for said year 1934 of gains from the sale of capital assets by the petitioner, Pauline F. M. Janney, in the amount of \$94,491, in contravention of sections 51 (b) and 117 (d) of the Revenue Act of 1934.

(2) The respondent has erroneously attributed a capital loss of \$729.82 (appearing in the petitioners' joint return as an item in arriving at a net income of \$21,564.31 from the W. C. Janney trust) to the petitioner, Walter C. Janney, whereas in fact said W. C. Janney trust was created by the petitioner Pauline F. M. Janney and said capital loss should be attributed to her and allowed as a deduction against the capital gains of said petitioner, Pauline F. M. Janney, in any event.

A stipulation has been filed which disposes of issue (2) above in petitioners' favor. Effect will be given to this stipulation in a recomputation under Rule 50.

The facts in this proceeding have all been stipulated and we adopt them as our findings of fact. The following resume¹ of the facts will suffice for the purposes of this opinion:

The petitioners are husband and wife, residing at Bryn Mawr, Pennsylvania, and were living together throughout the year 1934. During the year 1934 the wife, Pauline F. M. Janney, realized gains from the sale of capital assets in the amount of \$127,501.02. The amount of such gains to be taken into account under section 117 (a) of the Revenue Act of 1934 was \$94,491. During the year 1934 the husband, Walter C. Janney, suffered losses from the sale of capital assets in the amount of \$229,544.66, of which the amount to be taken into account under section 117 (a) of the Revenue Act of 1934 was \$91,963.35.

37 The petitioners filed a single joint return for the year 1934 with the collector of internal revenue for the first district of Pennsylvania at Philadelphia, Pennsylvania. In this return the capital gains of the wife, in the amount of \$94,491 as stated above, were included in gross income, and the capital losses of the husband in the amount of \$91,963.35 were deducted in toto. The joint return showed a net income (including other items not concerned in this case) of \$26,160.30, on which normal and surtaxes in the amount of \$1,648.91 were computed.

In determining the deficiency the respondent, in accordance with the provisions of article 117-5 of Regulations 86, determined that the losses of petitioner Walter C. Janney from the sale of capital assets could not be applied to reduce the gains realized by petitioner Pauline F. M. Janney from the sale of capital assets. Accordingly, respondent refused to permit the losses of petitioner Walter C. Janney from the sale of capital assets in the amount of \$91,963.35 to be offset against the gains from the sale of capital assets in the amount of \$94,491 realized by petitioner Pauline F. M. Janney for the purpose of computing their net taxable income for the calendar year 1934, except to the extent of the \$2,000 limitation provided for by section 117 (d) of the Revenue Act of 1934. By reason of such holding, respondent increased the capital gain reported by the petitioners on their joint return by an amount of \$89,963.35.

¹ See footnote on p. 25.

The applicable sections of the statute and the Treasury regulations promulgated in pursuance thereof are printed in the margin.² By a reading of article 117-5 of Regulations 38 86 it will be seen that the situation which we have in the instant case is specifically covered thereby.

It is well settled that regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and pursuant to authority granted in the statute, have the force and effect of law if they are reasonable and are not in conflict with some express provision of the statute.

39 Maryland Casualty Co. v. United States (1920), 251 U. S. 342, 349, and cases there cited; United States v. Eliason (1842), 16 Pet. 291; Ex parte Reed (1879), 100 U. S. 13; In re Kollock (1897), 165 U. S. 526; Alfred E. Fuhlage (1935), 32 B. T. A. 222, 229.

The petitioners concede that the aforementioned regulation is applicable and that it sustains the action taken by the Commissioner in his determination of the deficiency, if it is valid. Petitioners contend that the regulation is invalid in that it puts an interpretation on the provisions of section 117 (d) of the Revenue Act of 1934 which is not justified by the language of that provision when read in conjunction with other provisions of the same revenue act. Petitioners' contention may be summarized to be briefly this: That in applying section 117 (d) to a joint

² Revenue Act of 1934—

SEC. 51. INDIVIDUAL RETURNS.

(b) Husband and Wife.—If a husband and wife living together have an aggregate net income for the taxable year of \$2,500 or over, or an aggregate gross income for such year of \$5,000 or over—

(1) Each shall make such a return, or
(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

SEC. 117. CAPITAL GAINS AND LOSSES.

(d) Limitation on Capital Losses.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of \$2,000 plus the gains from such sales or exchanges.

Regulations 86—

ART. 51.—A husband and wife living together for the entire year need make no returns unless their aggregate gross income for the taxable year is at least \$5,000, or their aggregate net income is at least \$2,500. If their aggregate net income for the taxable year is \$2,500 or more, or their aggregate gross income in \$5,000 or more, either each must make a return or the income of each must be included in a single joint return. If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income. A joint return of husband and wife may be filed only if they were living together at the close of their taxable year. If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year.

ART. 117-5. Application of section 117 in the case of husband and wife.—In the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

return filed by husband and wife it should be construed as if it read thus:

In a joint return of husband and wife losses of both spouses from sales or exchanges of capital assets shall be allowed only to the extent of \$2,000 plus the gains of both spouses from such sales or exchanges.

When we consider that it is now well settled that although husband and wife may, under the permission granted them by law, file a joint return, they are nevertheless regarded as separate taxpayers, we think the construction of section 117 (d) for which petitioners contend is not admissible. A very similar contention was made in *H. Denny Pierce et al.*, 37 B. T. A. 225, as to the construction of section 23 (r) (1) of the Revenue Act of 1932, but we denied it.

In the *Pierce* case husband and wife filed a joint income tax return. The husband realized profits in the taxable year from sales of securities held less than two years but sustained no losses from such sales. The wife sustained losses in the taxable year from such sales but realized no profits from like sales. We held that under section 23 (r) (1) of the Revenue Act of 1932 the wife could not deduct the loss from her gross income not 40 connected with the sale of securities held less than two years; nor could the husband in a joint return offset the wife's loss against his profits from the sale of securities held less than two years.

Section 23 (r) (1) of the Revenue Act of 1932, which was involved in the *Pierce* case, reads as follows:

(r) LIMITATION ON STOCK LOSSES.—

(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations) * * *.

While section 117 (d) of the Revenue Act of 1934, involved in the instant case, deals with the subject of "Limitation on Capital Losses," whereas section 23 (r) (1) of the Revenue Act of 1932 deals with the subject of "Limitation on Stock Losses" from the sale of securities held for less than two years, we can see no valid reason why a different construction should be given to section 117 (d) of the Revenue Act of 1934 in applying it to a joint return of husband and wife than that which we gave under similar circumstances to section 23 (r) (1) of the Revenue Act of 1932 in the *Pierce* case. Our decision in the *Pierce* case was recently affirmed by the Second Circuit in *Pierce v. Commissioner*, — Fed. (2d) —, (Dec. 12, 1938).

On the authority of the Pierce case, supra, we affirm the Commissioner in applying the provisions of section 117 (d) of the Revenue Act of 1934 to the joint return filed by petitioners. Decision will be entered under Rule 50.

41 Before United States Board of Tax Appeals

Decision

Entered March 9, 1939

Pursuant to the opinion of the Board promulgated January 31, 1939, the respondent herein on February 23, 1939, filed a notice of settlement and proposed recomputation and the petitioner on March 3, 1939, having filed an acquiescence in said recomputation, it is

Ordered and decided that there is a deficiency in income tax for the year 1934 in the amount of \$36,700.00.

(Sgd.) EUGENE BLACK, *Member*.

42 In United States Circuit Court of Appeals, for the Third Circuit

[Title omitted.]

Petition for review

Filed April 26, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now come Walter C. Janney and Pauline F. M. Janney by their attorneys, Bernhard Knollenberg and Harry J. Rudick, and hereby petition for a review of the determination of the United States Board of Tax Appeals promulgated in the above-entitled case on January 31, 1939, and of the final order and decision entered therein March 9, 1939, and respectfully show to this Honorable Court as follows:

I. Petitioners are individuals living together as husband and wife and were at all times during the calendar year 1934 and still are, residents and citizens of the United States, residing at Bryn Mawr, Pennsylvania, within the First District of Pennsylvania. Petitioners, on March 15, 1935, duly filed in accordance with Section 51 (b) of the Revenue Act of 1934 a joint income-tax return for the year 1934 with the Collector of Internal Revenue for the First District of Pennsylvania, whose office is located in the City of Philadelphia, County of Philadelphia,

and State of Pennsylvania, within the jurisdictional limits of the United States Circuit Court of Appeals for the Third Circuit.

43 II. The respondent on review (hereinafter referred to as the "Commissioner") is the duly qualified and acting Commissioner of Internal Revenue of the United States holding his office by virtue of the laws of the United States. The Commissioner determined a deficiency in petitioners' income tax for the calendar year 1934 as computed in the joint return filed by them pursuant to Section 51 (b) of the Revenue Act of 1934 in the amount of \$37,109.29 and mailed to petitioners a notice of such deficiency dated July 28, 1936, in accordance with the provisions of Section 272 (a) of the Revenue Act of 1934. Thereafter on , 1936, petitioners filed with the United States Board of Tax Appeals a petition for the redetermination of such deficiency which received the docket number 86849.

Pursuant to the determination contained in its opinion promulgated January 31, 1939, and reported in 39 B. T. A.

(No. 36), the Board of Tax Appeals made its final order and decision which was entered March 9, 1939, that the deficiency in the petitioners' income tax for the year 1934 was \$36,700.60.

III. The nature of the controversy is as follows:

Petitioners in their joint income tax return for the year 1934, filed pursuant to Section 51 (b) of the Revenue Act of 1934, offset losses sustained by petitioner, Walter C. Janney, upon sales of capital assets (as defined in the Revenue Act of 1934) against gains realized by petitioner, Pauline F. M. Janney, upon sales of capital assets.

The percentage of such gains realized by petitioner, Pauline F. M. Janney, to be taken into account in computing net income under Section 117 (a) of the Revenue Act of 1934 was \$94,491 and the percentage of such losses sustained by petitioner, Walter C. Janney, to be taken into account in computing net income under Section 117 (a) of the Revenue Act of 1934 was \$91,963.35.

The Commissioner disallowed the deduction of the amount of such losses sustained by petitioner, Walter C. Janney, in
44 excess of the limit of \$2000 provided in Section 117 (d) of the Revenue Act of 1934 and the effect of such disallowance was to increase petitioners' aggregate net income by \$89,963.35, resulting in a deficiency in tax of \$36,700.60.

Petitioners contended in their appeal to the Board of Tax Appeals that in computing their aggregate net income under Section 51 (b) of the Revenue Act of 1934 and other applicable sections of said act, losses sustained by petitioner, Walter C. Janney, upon sales of capital assets should be deducted from gains realized by petitioner, Pauline F. M. Janney, upon sales of capital assets

and that Article 117-5 of Reg. 86 is invalid in ruling that the limitation provided in Section 117 (d) of the Revenue Act of 1934 upon the allowance of losses of one spouse from sales or exchanges of capital assets should be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

The Board of Tax Appeals sustained the determination of the Commissioner and held that the amount of losses sustained by petitioner, Walter C. Janney, upon sales of capital assets to be taken into account in computing petitioner's aggregate net income for the year 1934 is limited to \$2,000 under Section 117 (d) of the Revenue Act of 1934.

IV. Petitioners state that in the decision and final order of the Board of Tax Appeals manifest error occurred to petitioners' prejudice and assign the following errors:

1. The Board of Tax Appeals erred in deciding that the amount of losses sustained by petitioner, Walter C. Janney, upon sales of capital assets to be taken into account in computing petitioners' aggregate net income for the year 1934, is limited to \$2,000 by the provisions of Section 117 (d) of the Revenue Act of 1934.

2. The Board of Tax Appeals erred in failing to decide that the amount of losses sustained by petitioner, Walter C. Janney, upon sales of capital assets to be taken into account
45 in computing petitioners' aggregate net income for the year 1934 under Section 51 (b) of the Revenue Act of 1934 and other applicable sections of said act was \$91,963.35.

3. The Board of Tax Appeals erred in failing to decide that in computing the net income of husband and wife who have filed a joint income-tax return under Section 51 (a) of the Revenue Act of 1934, the aggregate losses of such husband and wife from sales or exchanges of capital assets should be deducted from the aggregate gains of such husband and wife upon sales or exchanges of capital assets and that the limitation provided in Section 117 (d) of the Revenue Act of 1934 upon the allowance of losses from sales or exchanges of capital assets should be applied to the aggregate net losses of such husband and wife.

4. The Board of Tax Appeals erred in failing to decide that Article 117-5 of Reg. 86 is invalid in ruling that the limitation provided in Section 117 (d) of the Revenue Act of 1934 upon the allowance of losses of one spouse from sales or exchanges of capital assets should be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

5. The Board of Tax Appeals erred in ordering and deciding that there is a deficiency in petitioners' income tax for the year 1934 in the amount of \$36,700.60.

6. The Board of Tax Appeals erred in failing to order and decide that there is no deficiency in petitioners' income tax for the year 1934.

Wherefore, petitioners pray that the action of the Board of Tax Appeals in this case be reviewed by this Court; that the order and decision of the Board of Tax Appeals be reversed; that appropriate action be taken to the end that the errors complained of be reviewed and corrected by this Court; and that petitioners be granted such other and further relief as may to said Court appear proper in the premises.

Respectfully submitted.

BERNHARD KNOLLENBERG,
HARRY J. RUDICK,
Counsel for Petitioners,
25 Broadway, New York, N. Y.

[Duly sworn to by B. Knollenberg and H. J. Rudick; jurats omitted in printing.]

48 In United States Circuit Court of Appeals

Proof of service

Filed April 29, 1939

SIR: Please take notice that the undersigned has this day filed with the United States Board of Tax Appeals on behalf of the petitioners in the above-entitled case, a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the determination of the United States Board of Tax Appeals promulgated in the above-entitled case on January 31, 1939, and of the final order and decision entered therein on March 9, 1939. A copy of the petition for review and assignments of error as filed is attached hereto and served upon you.

Dated April 26, 1939.

HARRY J. RUDICK,
Counsel for Petitioners,
25 Broadway, New York, N. Y.

TO COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Service of a copy of the foregoing notice of filing, together with one copy of the petition for review and assignments of error, is acknowledged this twenty-sixth day of April 1939.

(Sgd.) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

49

Before United States Board of Tax Appeals

Praeceptum for record

Filed May 9, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the Third Circuit copies duly certified as correct of the following documents in the above-entitled case:

1. The docket entries of proceedings before the Board.
2. Pleadings before the Board.
3. Opinion and decision of the Board.
4. Stipulation of facts adopted as findings of fact by the Board.
5. Petition for review, together with notice of filing and proof of service.
6. This praecipe.

HARRY J. RUDICK,
Attorney for Petitioners,
25 Broadway, New York, N. Y.

Service of a copy of the foregoing praecipe is acknowledged this twenty-ninth day of April, 1939. No counter-praecipe will be filed.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue, Counsel for Respondent.

50 [Clerk's certificate to foregoing transcript omitted in printing.]

51 In United States Circuit Court of Appeals for the
Third Circuit

No. 7130. October Term, 1939

WALTER C. JANNEY AND PAULINE F. M. JANNEY, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Minute entry of hearing

And afterwards, to wit, the 16th day of October 1939, come the parties aforesaid by their counsel aforesaid, and this case being

called for argument sur pleadings and briefs, before the Honorable Francis Biddle, Honorable Charles Alvin Jones, and Honorable Joseph Buffington, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 26th day of December 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

52 In United States Circuit Court of Appeals for the
Third Circuit

No. 7130. October Term, 1939

WALTER C. JANNEY AND PAULINE F. M. JANNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review From the United States Board of Tax
Appeals

Opinion

Filed December 26, 1939

Before BIDDLE, JONES, and BUFFINGTON, Circuit Judges.

BIDDLE, Circuit Judge.

* The petitioners were married and living together in 1934. Mrs. Janney realized gains and Mr. Janney losses in that year on the sale of capital assets. They filed a joint income-tax return in which the losses were used to offset the gains. Except to the extent of \$2,000 the Commissioner of Internal Revenue disallowed all the losses, on the ground that the losses of one spouse could not be set off against the gains of the other. The Board of Tax Appeals sustained the Commissioner, and this appeal followed.

The statutory provisions involved are found in the Revenue Act of 1934. Section 51 (b)^{*} provides:

"(b) Husband and wife.—If a husband and wife living together have an aggregate net income for the taxable year of \$2,500 or over, or an aggregate gross income for such year of \$5,000 or over—

^{*} 26 U. S. C. A., § 51.

- 53 “(1) Each shall make such a return, or
 “(2) The income of each shall be included in a single
 joint return, in which case the tax shall be computed on the
 aggregate income.”

Section 23⁴ of the act provides, with respect to capital losses:
 “In computing net income there shall be allowed as deduc-
 tions:

 “(j) Capital losses.—Losses from sales or exchanges of capi-
 tal assets shall be allowed only to the extent provided in section
 117 (d).”

The relevant part of Section 117 (d)⁵ is as follows:

 “Limitation on capital losses.—Losses from sales or exchanges
 of capital assets shall be allowed only to the extent of \$2,000
 plus the gains from such sales or exchanges.”

The decision of the Board is supported by the authority of the
 Second, First, and Fourth Circuits, respectively, in *Pierce v.*
Commissioner, 100 F. (2d) 397, 398; *Sweet v. Commissioner*,
 102 F. (2d) 103; and *Nelson v. Commissioner*, 104 F. (2d) 521,
 involving the construction of the Act of 1932, a similar statute.⁷
 Judge Learned Hand dissented vigorously in the *Pierce* case;
 and the two later decisions, noting the doubt without expanding
 the reasoning, followed the precedent of the majority.⁸ In the
Pierce case, Treasury Regulation 77, Art. 381, provided that
 where “the income of each is included in a single joint return, the
 tax is computed on the aggregate income and all deductions or
 credits to which either is entitled shall be taken from such
 54 aggregate income.” Section 23 (r)⁹ of the Act of 1932,

which was before the court, limited stock losses to “losses
 from sales or exchanges of stocks * * * which are not capi-
 tal assets (i. e., held less than two years) * * * only to the
 extent of the gains from such sales or exchanges * * *.” The
 majority reasoned that neither taxpayer, under this limitation,
 could take the deduction, since the wife had no gains, and the
 husband could not deduct the loss of another taxpayer. Judge
 Hand, accepting the Regulation, could find no preference for a

⁴ 26 U. S. C. A. § 23.

⁵ 26 U. S. C. A. § 101.

⁶ Application for Certiorari denied, 52 S. Ct. 822. Certiorari was also denied in
Demuth v. Commissioner, 100 F. (2d) 1012 (C. C. A. 2), 59 S. C. 822.

⁷ Section 23 (r) of the Revenue Act of 1932.

⁸ In the *Sweet* case the court said: “While the decision of the Court of Appeals
 for the Second Circuit may involve some doubt, we do not regard it as clearly wrong,
 and, being squarely in point, we follow it.” In the *Nelson* case too the court felt
 constrained to recognize the impressiveness of the dissent. “While a majority of this
 Court are much impressed with the reasoning of Judge Learned Hand in his dissent-
 ing opinion in the *Pierce* case, the legal question involved is a close one and we feel
 that we should follow the decisions of the First and Second Circuits, particularly in
 view of the denials of certiorari by the Supreme Court.”

⁹ 26 U. S. C. A. § 23, Historical Note (r).

construction of the statute holding that this clause "imposes a condition upon the privilege, as opposed to a limitation upon its amount." He argued that when the Act required the tax to be computed on the net aggregate income it meant the balance after adding all the items of gross income and subtracting all deductions. The limit on stock losses would then "be the aggregate of 'non-capital' gains of both spouses, and to single out those of the spouse who has 'non-capital' losses is to trace into the account the several sources of the 'aggregate income,' which is precisely what the account need not, and should not, do."

With this reasoning we agree. Other allowable deductions in excess of gross income of one spouse may be deducted from the net income of the other, for otherwise there would be no point in filing a joint return. Thus the right to file the joint return involves the necessity of disregarding the source from which the deduction is derived. The Government suggests that husband and wife cannot be regarded as a joint entity—have not been by the cases construing tax statutes. But that seems to us uncon-

55 vincing in considering whether a statute authorizing a single return for both does not also contemplate a consolidation of the losses and gains of both, a more rational and more direct construction of a statute evidently intended by Congress to be in favor of the taxpayer.¹⁰ Since the statute provides that in the case of a joint return "the tax shall be computed on the aggregate income" it logically and indeed necessarily follows, in the absence of an express statutory provision to the contrary, that in arriving at joint net income both gross income and deductions of the spouses must be aggregated and treated as the income and deductions of a single taxpayer.

We must now consider the effect of Regulation 86, Art. 117-5, promulgated under the Act of 1934. This article is as follows:

"Application of section 117 in the case of husband and wife.—In the application of section 117 a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets."

Prior to the promulgation of Art. 117-5, Art. 381 had been in effect, unchanged, for many years, and had been sanctioned by the reenactment of a number of statutes, including the Act of 1934. The Commissioner of Internal Revenue had, on December 29, 1932, when the question was submitted to him, expressed the

¹⁰ See *Commissioner v. Thomas*, 84 F. (2d) 562, 563 (C. C. A. 5): "Section 51 (permitting husband and wife to file a joint return) is clearly intended by Congress to be in favor of the taxpayer."

opinion that "the loss sustained by the husband would offset the same amount of gain realized by the wife from such source."¹¹ Therefore, up until the time when Art. 117-5 was issued, we have a construction by the Commissioner in favor of the taxpayer, in accordance with Judge Hand's view of the meaning of the Act and of Art. 381. The Commissioner now takes
 56 the position that his former opinion is "informal" and inconsistent with the new regulation. It is not, of course, a treasury regulation and does not have the validity or effect of a regulation. *Helvering v. New York Trust Co.*, 292 U. S. 455, 468; *Biddle v. Commissioner*, 302 U. S. 573, 582. But it is a treasury interpretation of the meaning of the statute, an interpretation which is altered in the new regulation. We think that Art. 117-5 is not a construction warranted by the words of the section permitting the joint return, words which, in our opinion, are unambiguous and clear from substantial doubt.

In coming to this conclusion we have considered the rule of law which holds that in interpreting a statute we should give great weight to the administrative construction of the law where, after a ruling has been prescribed, the section of the statute to which it applies is enacted in the same words. The Commissioner argues that the text of Art. 117-5 was included in the regulations issued under the Revenue Acts of 1936 and 1938, and that a provision limiting the deduction of capital losses was reenacted in both of these acts, showing legislative approval of the regulations. But Section 51 (b) was not reenacted in 1938. The section was changed to read: "(b) Husband and wife.—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a non-resident alien." The construction, therefore, expressed in Art. 117-5 "was neither uniform, general, nor long-continued * * *." *Iselin v. U. S.*, 270 U. S. 245, 251. In most of the cases where the rule has been invoked the administrative act has been approved by successive enactments without change, and emphasis is laid, in the applica-
 57 tion *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401; *Copper Queen Mining Co. v. Arizona Beard*, 206 U. S. 474, 479; *Helvering v. Winmill*, 305 U. S. 79, 83.¹²

¹¹ C. C. H. Fed. Tax Ser. 1933, 111, Par. 6037.

¹² An exception is found in *Hassett v. Welch*, 303 U. S. 303, 312, where an amendment to the Federal Estate Tax was passed in 1931, and had been construed by a treasury regulation in 1932, and reenacted in 1933.

But administrative regulations are not conclusive, but are at most decisions which can be changed, and afford to the courts in the ultimate test nothing more than persuasive rules of construction. It has never been said that administrative action removes the statute from the field of judicial construction. As Judge Learned Hand remarked, in *F. W. Woolworth Co. v. United States*, 91 F. (2d) 973, 976: "At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed * * * to suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already. While we are of course bound to weigh seriously such rulings, they are never conclusive * * *." If this were not so, regulations stratified by the "sanction" of law would lose all requisite flexibility. The principle "does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by re-enactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers."¹⁸

The decision of the Board of Tax Appeals is reversed, and the case is remanded for further proceedings in conformity with this opinion.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for
the Third Circuit.

58 In United States Circuit Court of Appeals for the
Third Circuit

No. 7130. October Term, 1939

WALTER C. JANNEY AND PAULINE F. M. JANNEY, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

(Filed Dec. 26, 1939)

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

¹⁸ *Helvering v. Wilshire Oil Co., Inc.* — U. S. —, decided November 6, 1939.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, and the cause is remanded to the said Board of Tax Appeals for further proceedings in conformity with the opinion of this court. Philadelphia, December 26, 1940.

FRANCIS BIDDLE,
Circuit Judge.

[File endorsement omitted.]

59 [Clerk's certificate to foregoing transcript omitted in
printing.]

60 Supreme Court of the United States

Order allowing certiorari

(Filed April 29, 1940)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

Endorsement on cover: File No. 44250. U. S. Circuit Court of Appeals, Third Circuit. Term No. 843. Guy T. Helvering, Commissioner of Internal Revenue, petitioner vs. Walter C. Janney and Pauline F. M. Janney. Petition for a writ of certiorari and exhibit thereto. Filed March 26, 1940. Term No. 843 O. T. 1939.